

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SAINT PAUL CITY COUNCIL

In re the Licenses held by Wittwer Fitness, Inc., d/b/a Anytime Fitness for the premises located at 1678 Suburban Avenue, Saint Paul

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

This matter was heard by Administrative Law Judge Beverly Jones Heydinger, on March 12, 2008, in Room 40A, Saint Paul City Hall – Ramsey County Courthouse, 15 West Kellogg Boulevard, Saint Paul, Minnesota. The hearing was held pursuant to a Notice of Administrative Hearing dated February 15, 2008. Rachel Tierney, Assistant City Attorney, 400 City Hall, 15 West Kellogg Boulevard, Saint Paul, Minnesota, 55102, appeared on behalf of the City's Department of Safety & Inspections (DSI).¹ Kathryn K. Smith, Sherrill Law Office PLLC, 4756 Banning Avenue, Suite 212, White Bear Lake, MN 55110-3205, appeared on behalf of Wittwer Fitness, LLC St. Paul, d/b/a Anytime Fitness (Wittwer Fitness). The record closed on April 1, 2008, following receipt of the parties' post-hearing memoranda.

NOTICE

This report is a recommendation, not a final decision. The Saint Paul City Council will make a final decision after a review of the record and may adopt, reject, or modify these Findings of Fact, Conclusions, and Recommendation.² Pursuant to Saint Paul Legislative Code § 310.05 (c-1), the City Council shall not make a final decision until the parties have had the opportunity to present oral or written arguments to the City Council. Parties should contact Shari Moore, City Clerk, City of Saint Paul, 310 City Hall, 15 West Kellogg Boulevard, Saint Paul, Minnesota 55102, to ascertain the procedure for filing exceptions or presenting arguments.

¹ Formerly Office of License, Inspections and Environmental Protection (LIEP).

² Saint Paul Legislative Code §§ 310.05 (c-1).

STATEMENT OF THE ISSUE

1. Did Wittwer Fitness violate Saint Paul Legislative Code § 427.07 (12) and the corresponding license condition by operating a fitness club without having at least one employee or manager, trained and qualified in first aid and CPR on the premises during its hours of operation?

2. If so, is the City's proposed penalty of \$500 reasonable?

The Administrative Law Judge recommends that the Saint Paul City Council affirm the determination that Wittwer Fitness violated Legislative Code § 427.07 (12), and the condition on its license by operating a health and sport club without an employee on the premises who was trained in first aid and CPR, and affirm the proposed penalty of \$500.

Based on the record and proceeding herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Wittwer Fitness Inc. holds License ID # 20060003890 to operate a health and sport club and a tanning facility at 1678 Suburban Avenue, in Saint Paul.

2. Jason and Joseph Wittwer are brothers who own Wittwer Fitness.³ In November, 2006, they applied for a license to operate a fitness and tanning facility doing business as Anytime Fitness.⁴

3. Saint Paul Legislative Code § 427.07(12), applicable to a health and sport club, states:

At least one (1) employee or manager, trained and qualified in first aide and CPR according to the standards established by rule by the department of safety and inspections shall be on duty at all times that the licensed premises are in operation or open to member or the public.

4. Prior to the time that the license was issued, DSI staff met with Joseph Wittwer to discuss the requirements that applied to a health club and requested additional information about the lay-out of the club's space, the parking, and the heating

³ Ex. W1-2

⁴ Testimony (Test.) of Christine Rozek; Test. of Joseph Wittwer.

and ventilation system. In addition, Mr. Wittwer was informed about the requirement to give notice to the neighbors about the license application.⁵

5. In early January, 2007, about the time that the health club was scheduled to open, Jason Wittwer learned of DSI's interpretation that an employee or manager must be on the premises during all hours of operation.⁶

6. On at least two occasions in January 2007, Jason Wittwer met with Christine Rozek; William Gunther, Saint Paul's Environmental Health Manager; Saint Paul City Councilmember Kathy Lantry; and representatives of the Anytime Fitness franchisor, to discuss the ordinance. During the meetings, Jason Wittwer and the city officials discussed DSI's interpretation and the possibility of changing the ordinance to eliminate the "on duty" requirement. However, Councilmember Lantry determined that there was insufficient support on the City Council to enact such a change.⁷

7. The parties also discussed a variance from the "on duty" requirement. However, DSI did not grant a variance because if no staff member were on the premises, Wittwer Fitness members would not have immediate access to CPR.⁸

8. DSI issued a license to Wittwer Fitness that included a condition with the same requirement contained in §427.07(12) and a second condition for its tanning facility that stated: "Customer use of tanning facilities shall be restricted to those hours when at least one individual employed by the licensee is available on site."⁹ On January 9, 2007, Jason Wittwer returned the signed conditions to a DSI staff member with a cover memo that stated:

Here are the signed conditions that your department is requiring of me. Please understand that I agree to them under distress as I have no other choice and have to open my business at this time. I sincerely hope that some resolution can [be] made in the near future to accomodate (sic) our type of business and wish that these issues were brought to my attention at the beginning of the application process, rather the end...when it was too late to change course.¹⁰

⁵ Test. of C. Rozek; Test. of Joseph Wittwer.

⁶ Test. of Jason Wittwer.

⁷ Test. of Jason Wittwer; Test. of C. Rozek; Test. of W. Gunther.

⁸ Test. of W. Gunther.

⁹ This requirement is consistent with Minn. Stat. ch. 325H (Regulation of Tanning Facilities), and Saint Paul Legislative Code Chapter 380 (Tanning Facilities).

¹⁰ Ex. W2.

9. Jason Wittwer informed Joseph Wittwer about the meetings with the city's representatives.¹¹ Wittwer Fitness closed its facility for a short period of time in order to get its staff trained in first aid and CPR, but re-opened after some of the owners and employees completed the certification.¹²

10. Although Wittwer Fitness was aware of DSI's position that a staff member must be present in the health club during its hours of operation, it chose to interpret the term "on duty" to mean available by telephone. In so doing, Jason Wittwer and Joseph Wittwer compared the language that, in their view, required tanning facility staff to be on the premises with their view of the term "on duty" in the health club ordinance.¹³

11. Wittwer Fitness does not have an employee on the premises during all hours of operation. A staff member may be contacted by telephone at any time. Two hand-lettered signs are posted near the bathroom and the front door at the club that state "24 Hour Manager On Duty Call 651-353-5977," and one included the language "for emergency questions or concerns."¹⁴ The telephone number belongs to Michelle Wittwer's cell phone, which she keeps with her at all times that she is on duty. Ms. Wittwer lives about one mile from the health club and can get to the club in less than five minutes. Occasionally she works at the club as a personal trainer. She has been trained in first aid and CPR. When she is not available, an alternative number is posted for Joseph Wittwer or Jason Wittwer.¹⁵

12. Although Wittwer Fitness does not have an employee on the premises during all hours of operation, it does have necklaces that customers are encouraged to wear when using the exercise equipment, and panic buttons are located throughout the facility. The buttons are connected to "Pro Vision," a security company that will contact 911 for police assistance and also notify Wittwer Fitness. Neither the necklaces nor the buttons are directly connected to the 911 system.¹⁶

13. Wittwer Fitness also has security cameras. In the event that a person attempts to enter the facility without using a required security pass, the entry will be recorded on a computer system that is linked to the cameras. The owners and manager can check the computer from off-site to determine if a person has entered without the required pass and can check the recorded images from the security cameras to determine who entered and how the entry occurred. The cameras are not continuously monitored when persons are using the facility, but the computer program is checked regularly for unauthorized entry. The cameras are not linked to Pro Vision, and

¹¹ Test. of Joseph Wittwer.

¹² Test. of Jason Wittwer.

¹³ Test. of Joseph Wittwer; Test. of Jason Wittwer.

¹⁴ Exs. W7 and W8.

¹⁵ Test. of Michelle Wittwer.

¹⁶ Test. of Joseph Wittwer.

the security company cannot monitor the cameras. There is a coded key pad outside the building entrance to allow police and fire to gain access to the building.¹⁷

14. On one occasion, a panic button was pushed and Pro Vision called the police. Ms. Wittwer arrived at the facility after the police arrived.¹⁸ Jason Wittwer stated that the police arrive before the staff “every time” that a call is made.¹⁹

15. The Anytime Fitness business model provides low-cost access to health facilities 24-hours a day. The Wittwers are concerned that they cannot operate the model successfully if the facility must be staffed at all times. Moreover, they believe that the staffing requirement is out-dated because of the new security features and because the benefits of allowing low-cost access to health clubs at any time of day outweigh the small health risks of operating without a staff member present.²⁰

16. Robert Kessler, the Director of DSI, asked Ms. Rozek to check Wittwer Fitness for compliance with the code and its license condition. In response, Saint Paul Police Sergeant Craig Gromek and Sergeant Simmons went to the health club in the evening of November 8, 2007. The officers entered the facility by following a club member through the front door and found that there were no Wittwer employees or managers on the premises.²¹

17. Based on the police report, Ms. Rozek recommended adverse action against Wittwer Fitness.²²

18. The Wittwers have checked with hotels that have on-site fitness centers and do not believe that staff members are present when guests are using those facilities.²³

19. The Anytime Fitness franchisor is working with regulators in many states to educate them about the benefits of its business model, including greater access and affordability. Anytime Fitness stresses the security at its facilities, and the required training for staff and members, including training about the benefit of wearing a necklace with a panic button while exercising. There are 101 Anytime Fitness franchises in Minnesota, and all but three are open 24 hours a day. In no instance has a client suffered medical problems because of a delay in receiving medical treatment.²⁴

¹⁷ Test. of Joseph Wittwer.

¹⁸ Test. of M. Wittwer.

¹⁹ Test. of Jason Wittwer.

²⁰ Test. of Jason Wittwer.

²¹ Test. of C. Rozek; Ex. W3-2.

²² Test. of C. Rozek.

²³ Test. of Jason Wittwer; Test. of Joseph Wittwer.

²⁴ Test. of Mark Daly, National Media Director, Anytime Fitness.

20. The City first regulated health clubs in 1989. Since the City added the requirement for first aid and CPR training to the legislative code provision in approximately 1992, the City has consistently interpreted the term “on duty” in the code provision to mean that an employee or manager with the required training must be on the premises during all hours of operation. The purpose of the safety requirement is to assure that a trained person is on hand to render emergency assistance in the event that a customer is injured or suffers a heart attack while using the facility. Although there is a contact number posted at Wittwer Fitness, and customers may push a button in an emergency, neither is sufficient to provide immediate medical assistance.²⁵

21. William Gunther, the City’s Environmental Health Director, explained the importance of immediate administration of CPR to keep oxygen circulating to the brain, and the damage from loss of oxygen, including some brain damage in four minutes, permanent brain damage in seven minutes, and the poor chance of survival after twelve minutes without oxygen. If a patron were to call the number of the staff attendant rather than 911, the call would delay the emergency response. A person off-site would be unable to render the required assistance, and there would be no reason to require that person to have first aid or CPR training.²⁶

22. In addition, the City is concerned that unauthorized persons may enter the fitness club, which could pose a safety risk to its customers. An on-site employee would be available to immediately check the identity of such a person and take the appropriate steps to remove the individual.²⁷

23. Exercise rooms in hotels and condominiums do not require a health/sport club license because hotels and condominiums are not in the business of operating a health or sport club.²⁸

24. The City Council has authority to impose a fine upon any licensee as an adverse action, in an amount that is reasonable and appropriate. To that end, it has established presumptive penalties for violations. The City Council may deviate from the presumptive fine if there are substantial and compelling reasons to do so.²⁹

25. On December 6, 2007, the DSI sent a Notice of Violation to Wittwer Fitness alleging that Wittwer Fitness had violated St. Paul Legislative Code § 427.07 (12) and Condition One of its license. The notice stated that DSI would recommend a \$500 fine to the City Council for the violation.³⁰

²⁵ Test. of C. Rozek; Test. of W. Gunther.

²⁶ Test. of W. Gunther.

²⁷ Test. of C. Rozek.

²⁸ Test. of W. Gunther; See Saint Paul Legislative Code § 427.01.

²⁹ Saint Paul Legislative Code § 310.05(l) and (m).

³⁰ Ex. W4.

26. Wittwer Fitness requested a hearing to challenge the violation.³¹ The City issued a Notice of Administrative Hearing on February 15, 2008, scheduling the hearing for March 12, 2008.³²

27. There is no substantial or compelling reason to deviate from the presumptive penalty of \$500.00.

28. Any Finding of Fact more properly termed as a Conclusion is hereby adopted as a Conclusion.

CONCLUSIONS

1. The Administrative Law Judge and the Saint Paul City Council have jurisdiction in this case.³³

2. The Applicant received timely and proper notice of the hearing, and the City has complied with all relevant substantive and procedural requirements of statute and rule.³⁴

3. The City Council has authority to deny, suspend, or revoke a license and to impose penalties for the violation of applicable statutes and rules.³⁵ The presumptive penalty for a first violation is a \$500 fine.³⁶

4. DSI has the burden of proving that the Licensee violated the applicable provisions of state law and city ordinance by a preponderance of the evidence.

5. Saint Paul Legislative Code § 427.07 (12) states:

At least one (1) employee or manager, trained and qualified in first aid and CPR according to standards established by rule by the department of safety and inspections shall be on duty at all times that the licensed premises are in operation or open to members or the public. Such standards shall be in conformity with standards and guidelines established by the American Red Cross with respect to water safety instructors or by the American Heart Association for similar purposes.

³¹ Ex. W5.

³² Ex. W6.

³³ Saint Paul Legislative Code §§ 310.05, 310.06; Minn. Stat. § 14.55.

³⁴ See Minn. Stat. §§ 14.57 – 14.61; Saint Paul Legislative Code §§ 310.05; 310.06.

³⁵ Saint Paul Legislative Code §§ 310.05(l), 310.06.

³⁶ Saint Paul Legislative Code § 310.05(m).

6. DSI has reasonably interpreted the term “on duty” to mean that the employee or manager must be on the premises in order to give effect to the requirement that such an employee or manager must be trained in first aid and CPR. In light of the language of the provision as a whole, this is a reasonable interpretation that gives meaning to each part of the provision and is consistent with the obvious intent of the requirement.

7. DSI has proved by a preponderance of the evidence that Wittwer Fitness failed to have an employee or manager trained and qualified in first aid and CPR on duty while the licensed establishment was in operation and open to members, in violation of Saint Paul Legislative Code § 427.07 (12), and its license condition.

8. DSI’s proposed fine of \$500 is reasonable and consistent with the City’s penalty matrix.

9. The City Council may impose costs of a contested case hearing on a party if its position was “frivolous, arbitrary or capricious, made in bad faith, made for the purpose of delay or harassment,” and for other reasons that would not be applicable to the alleged violations in this matter.³⁷ Wittwer Fitness’s appeal of the violation of its license was taken in good faith and was not frivolous, arbitrary or capricious, or made for the purpose of delay or harassment.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the City of Saint Paul impose the presumptive fine of \$500 against Wittwer Fitness.

Dated: April 17, 2008

s/Beverly Jones Heydinger

BEVERLY JONES HEYDINGER

Administrative Law Judge

Digitally Recorded:

A-bjh-03122008

³⁷ Saint Paul Legislative Code § 310.05(k).

MEMORANDUM

The Saint Paul Legislative Code and the condition placed on Wittwer Fitness' license both required that an employee trained in first aid and CPR shall be "on duty" at all times that the facility was in operation or open to its members.³⁸ DSI has interpreted "on duty" in this context to mean that the employee must be on the premises. Wittwer Fitness does not deny that it operated its facility when no employee was on the premises who was trained in first aid and CPR. Wittwer Fitness claims that it complies with the requirement by posting the name and telephone number of a trained employee who is on duty and may be contacted at all times.

DSI's interpretation is consistent with the plain meaning of the ordinance. In order to give meaning to the full text, a person must be on the premises to perform first aid or CPR as needed. Persons who are ill or injured may not be able to assist themselves, and the time that it would take to summon a staff member who is away from the health club or to push a button that triggers a request for a police officer defeats the purpose of having a trained person available. A call to 911 will bring help with equal speed, regardless of whether a staff person trained in first aid or CPR were called first. If Wittwer Fitness's argument were logical, the ordinance would require posted notice to call 911 or push one of the panic buttons in an emergency. Although a police officer may be trained in first aid and CPR, this adds a step to obtaining the necessary medical care. Thus, the meaning Wittwer Fitness gives to the ordinance is unreasonable and fails to accomplish the purpose for which it was enacted. It also fails to give effect to the language of the ordinance as a whole by rendering the first aid and CPR training requirement meaningless. Wittwer Fitness's claim that CPR training includes instructing another person to perform CPR is not persuasive since there may not be a person on hand to take direction, and no way for the person giving direction to observe whether the directions were followed. Ordinances should be interpreted to give full effect to all the provisions, and not to interpret them in a manner that would lead to an unreasonable result or defeat the purpose for which they were enacted.³⁹

Moreover, DSI's interpretation of the ordinance is entitled to some deference because it is reasonable, consistent with the plain language of the ordinance, and is an interpretation of long-standing.⁴⁰ DSI's witness, Mr. Gunther, testified that since the first aid and CPR requirements were added to the ordinance, DSI has consistently required that an employee be on the premises.

Wittwer Fitness also challenges the applicable ordinance because exercise rooms in hotels and condominiums are not subject to the same license requirements.

³⁸ Saint Paul Legislative Code § 427.07 (12); Ex. H3.

³⁹ See e.g. Minn. Stat. § 645.17 (1 and 2) (principles of statutory construction).

⁴⁰ *Arvig Tel.Co. v. Northwestern Bell Tel. Co.*, 270 N.W.2d 111,114 (Minn. 1978); *In the Matter of the Cities of Annandale and Maple Lake*, 731 N.W.2d 502, 512-513 (Minn. 2007).

William Gunther explained that hotels and condominiums are not in the fitness business and offer exercise as an amenity to their customers or owners. A health club license is required only for persons in the business of operating a health/sport club.⁴¹ In addition, members of a condominium association are using equipment that they own, and the City does not regulate private, personal use of exercise equipment. Governments may regulate part of an activity or address part of a problem without regulating the entire field. It is not required to “strike at all the evils at once.”⁴²

Wittwer Fitness compares the use of the term “on duty” in the ordinance regulating health clubs with the more specific “on duty on the premises” language in the ordinance governing “game rooms.” Although the provision applicable to game rooms is more specific, it is also included in a provision that would not otherwise imply such specificity, unlike the requirement for health clubs that the employee on duty be certified for first aid and CPR. The City is not required to employ identical language throughout its ordinances, nor are the health club and game room provisions so likely to be read together that the different choice of words would cause confusion.

Wittwer Fitness also argues that the ordinance is out of step with updates in technology and fails to take into account that the benefits of being available at a low cost and at hours that serve many schedules outweigh the risks of using the exercise facility without a staff member present, or even on-duty. These arguments are more appropriately brought to the City Council for its consideration. Occasionally, in applying a law or rule, factual situations that were not considered during the legislative process come to light that may yield a harsh or undesirable result in a particular case. However, this does not make the law invalid so long as the law as applied is rationally related to the result that the enactment was intended to achieve. The ordinance would be invalid as applied only if its application lacked a rational relationship to the objective it was enacted to address.⁴³ In this case, it is clear that the application of the ordinance to Wittwer Fitness is consistent with its intended purpose and would in fact benefit the health club’s patrons. Wittwer Fitness claims otherwise, because it contends that it cannot charge its low rates if it must have staff on the premises during all hours of operation. Also, it believes that the enforcement of the ordinance is unfair because it was unaware of DSI’s interpretation at the time that it leased space, remodeled and opened. Although it may be more costly for Wittwer Fitness to comply with the ordinance, the reasonableness must be viewed from the end sought to be achieved and not in light of the ordinance’s application to a particular party.⁴⁴ Wittwer Fitness was

⁴¹ Compare Saint Paul Legislative Code § 427.01 (definition of health/sport club) with § 407.01 (definition of hotel).

⁴² *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466, 101 S.Ct. 715, 725(1981); *Essling v. Markham*, 335 N.W.2d 237, 240 (Minn. 1983).

⁴³ *Mammenga v. Dep’t of Human Services*, 442 N.W.2d 786, 789 (Minn. 1989), citing *Wickard v. Filbion*, 317 U.S. 111, 129-130, 63 S. Ct. 82, 91 (1942); *In the Matter of the Lawful Gambling License of Thief River Falls Amateur Hockey Ass’n*, 515 N.W.2d 604, 606-607 (Minn. App. 1994).

⁴⁴ *Broen Memorial Home v. Dep’t of Human Services*, 364 N.W.2d 436, 441 (Minn. App. 1985).

aware of DSI's interpretation from at least January 2007, up to the time of the inspection in November 2007, which led to the fine.

Appropriateness of the Penalty

DSI proposed a fine of \$500, the presumptive penalty for a first violation.⁴⁵ Wittwer Fitness was on notice of the requirement and DSI's interpretation of it. It is doubtful that a warning would have the desired deterrent effect. Based on the facts presented, the presumptive penalty is reasonable.

⁴⁵ Saint Paul Legislative Code § 310.05(m).

DSI's request for costs

DSI may request costs if the Licensee's appeal was frivolous, arbitrary or capricious. No such award of costs is justified in this instance. Wittwer Fitness sincerely believes that the ordinance should not be applied to it, and those arguments, although unpersuasive, were not specious or advanced solely to delay or harass enforcement.

B.J.H.